No. 14406

In the United States Court of Appeals for the Ninth Circuit

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

IDAHO LUMBER COMPANY, A CORPORATION, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO, EASTERN DIVISION

BRIEF FOR APPELLEE

ALBAUGH, BLOEM, BARNARD AND SMITH
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Argument:

Where an employer is not engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act, his employees are not within the coverage of the Act.

A single, isolated transaction, outside of the usual and ordinary course of an employer's business does not constitute engaging in interstate commerce within the meaning of the Act.

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JURISDICTION

The nature of this action as a suit by the Administrator of the Fair Labor Standards Act to recover alleged overtime compensation and the appropriate statutory reference giving the trial court and this court's jurisdiction over actions of such nature are correctly set forth in appellant's Statement of Jurisdiction.

FACTS

Appellee can agree generally with appellant's statement of the facts of the case, as far as it goes, but there are certain omissions therein which appellee believes are material to appellee's theory of the case and to an understanding of the trial court's disposition

of the case. For that reason we present our view of the facts.

Appellee is an Idaho corporation, which owns and operates a small sawmill and planing mill near Salmon, Idaho, and a cabinet shop in Idaho Falls, Idaho. It uses a substantial part of the lumber produced at Salmon in the cabinet shop at Idaho Falls and sells the balance. In the ordinary and usual course of the company's business, this surplus was sold to retail dealers for use in local projects and occasionally to contractors constructing housing projects, all within the State of Idaho. The record shows that the corporation was wholly managed and operated by its president, A. B. Johnson.

The corporation had an arrangement with the Reilly Atkinson Company for the financing of its production and sale of lumber. Mr. Johnson personally made most of the sales, turned the orders over to Reilly Atkinson Company, which arranged the credit with the customers, and Johnson would make delivery direct to the jobs (45-47). It was Mr. Johnson's express purpose and intention to restrict the sales of the company's product to customers who would use the lumber within the State of Idaho. His reason for restricting the sales to people in Idaho was to avoid having the Fair Labor Standards Act apply. (49)

The record is quite pursuasive that appellee was successful in its efforts to confine its operations to intrastate commerce within the State of Idaho during the approximately three year period of its existence prior to its becoming a party to the contract with

Rogers Brothers Seed Company, hereinafter described, and which is the only transaction which appellant now claims brought appellee's employees within the coverage of the Act during the time the contract was being fulfilled. In his complaint, appellant claimed coverage during certain other periods, based on about three other items, but the evidence apparently has satisfied appellant that such other items did not constitute production for interstate commerce within the meaning of the Act, as appellant's brief shows that his claim is now confined to the periods when the employees were engaged in production for the Rogers Brothers Seed Company contract. (3). Although not computed in his brief, appellant's statement of the periods involved and reference to the Exhibits will disclose that the amounts now claimed are $47.00 for Sylvester Kramp, $35.00 for Clifford Pierce, $59.22 for Robert Horn, and $299.76 for LaVerne Westfall.

In February of 1952, appellee entered into an agreement to manufacture a quantity of bean boxes and pallets for Rogers Brothers Seed Company. This concern is a corporation with its offices and principal place of business at Idaho Falls, Idaho. It purchases certain type of grain, including beans and peas, from growers, which it processes into various types of feed and seed. It has some of its processing plants located outside the State of Idaho. These bean boxes and pallets are in the nature of plant equipment used in handling beans and peas in the processing plants. They were not in the nature of shipping containers, but were kept in the plants themselves for use in moving and handling beans and peas therein. (48-49).

When appellee's president first obtained the order from Rogers Brothers Seed Company, he had no knowledge that the bean boxes and pallets were to go to any of the out-of-state processing plants (27-28, 39), but before any work was commenced on the production of the lumber at the Salmon sawmill, arrangements were made by the customer for appellee to deliver part of the boxes and pallets to plants outside the state (27-28).

Appellee had a building at Salmon, equipped for woodworking, which it intended eventually to put into operation fabricating cabinets and other items from lumber produced by its sawmill, similar to the operations conducted at its Idaho Falls woodworking shop, but had never been able to finance such an operation on a regular basis (56-57). A few cabinets and some survey stakes were made there, for local use around Salmon, and some panels were made there for use in the Idaho Falls shop, but that is all it was ever used for until the Rogers Brothers Seed Company contract was entered into. (55-56). Appellee determined to use this Salmon shop, however, to fabricate the bean boxes and pallets for this contract. (55-57).

The Rogers Brothers Seed Company contract originally contemplated that $11,561.49 of the bean boxes and pallets would be delivered to the customer's out-of-state plants, but the shipping records show that the customer later ordered a change in the place of delivery from the originally intended destination to its Idaho Falls plant of between $2,000 and $3,000 worth, for use in the latter plant. Accordingly, between $8,500 and $9,500 worth of these bean boxes and pallets were all

that were actually delivered outside the State of Idaho. The production of the lumber for the bean boxes and pallets and the fabrication thereof extended over a period of five months, and appellee's employees involved in this case were engaged at various times during this period in different phases of the work, as is set forth on page 3 of appellant's brief. During this period appellee's total sales amounted to approximately $80,000.

The trial court found that the only transaction wherein any of appellee's lumber or productions went outside the State of Idaho was the delivery of the bean boxes and pallets to Rogers Brothers Seed Company out-of-state seed processing plants, which were made under a single contract, constituting an isolated transaction outside the ordinary and usual course of defendant's business and operations, and, as such, did not constitute production of goods for interstate commerce within the meaning of the Fair Labor Standards Act, and, accordingly, none of the employees involved was engaged in such production within the meaning of that Act.

ISSUES

The only issue in the case is whether this particular transaction constituted production for interstate commerce within the meaning of the Act.

ARGUMENT

We in no way dispute the settled rule of law which appellant so fully advances that the applicability of the Fair Labor Standards Act is determined, not by the

nature of the employer's business, but by the character of the employee's activities.

It is probably somewhat axiomatic to point out that, unless the employer is engaged in some manner in production for interstate commerce, none of his employees can possibly be so engaged.

Baloc vs. Foley Bros. (D. C. Minn.) 68 Fed. Supp. 533

Fleming vs. Jacksonville Paper Co., 128 Fed. 2d, 395

It is only in cases where the employer's business enters the field of interstate commerce that the rule can have any application. Probably the greatest number of decided cases have arisen where the employer was engaged in production for both interstate and intrastate commerce, and the question to be determined was within which field any particular employee's work fell. That appears to be the question in every case cited by appellant in support of the rule.

Stated another way, there are many employers engaged in interstate commerce, but it does not necessarily follow that all of their employees are so engaged.

Clougherty vs. Vernor Co., 187 Fed. 2d, 288
Blumenthal vs. Guard Trust Co., 141 Fed. 2d
Collins vs. Ford, Bacon & Davis, Inc., 66 Fed. Supp. 424

In reading through any number of the reported cases where the question of coverage has arisen, it becomes apparent that the courts almost always first consider and state whether or not the **employer** is engaged in interstate commerce or the production of goods for interstate commerce, even though they are well aware

that coverage of any particular employee or group of employees is ultimately to be determined by the nature of the **employees'** activities. In fact. some of the courts have expressly stated that it is proper to do so.

Lewis vs. Florida P. & L. Co., 154 Fed. 2d, 751
Oliphant vs. Kaser (Iowa Dist. Ct.) 10 Labor Cases 62928

Round vs. N. Y. Guernsey Breeders' (N. Y.) 194 Misc. 701

There are many cases where an employer has been found to be in interstate commerce, but not all of his employees are engaged in that phase of his business, and such employees do not come within the coverage of the Act. The Act itself contemplates that an employer may segregate his employees so that part of them may work on goods for interstate commerce and part on goods for local consumption, and coverage extends only to those who work on the goods produced for interstate commerce.

Montalvo vs. Porto Rico Tob. Corp. (D. C., P. R.) 6 Lab. Cases 61,428

Carter vs. Royal Crown Bot. Co., (D. C., Tenn.) 7 Lab. Cas. 61,951

Agosta vs. Rocafort (D. C., P. R.) 9 Labor Cas. 62,610

Blanket coverage on an industry-wide basis is not within the contemplation of the Act nor the intent of Congress. Thus, it is possible that in a given industry an employer may not be subject to the Act, while another employer in the same industry may be subject to regulation with respect to part of his employees and

not others, or he may be subject to regulation with respect to all. This point is well illustrated by Walling vs. Jacksonville Paper Co., 317 U. S. 564, where the court points out that it was not necessary for the plaintiff to show that **all** of the employer's business must have an interstate character. Conversely, it follows that it must be shown that **some** of it does have that character before determining that the employee's activities are connected with that part.

The courts have quite universally held that a mere incidental engagement in interstate commerce is insufficient to sustain a recovery under the Act, in determining and interpretating the intent of Congress as to the scope of the Act. Illustrative of such holdings are the cases where the "de minimis" doctrine has been applied, and where coverage under the Act has been denied employees primarily engaged in intrastate commerce, who fail to prove a **substantial** engagement in interstate commerce.

Schwartz vs. Witwater Grocery Co., 141 Fed. 2d, 341

Block's Shoe Stores vs. Walling 139 Fed. 2d 268
Mile High Poultry Farms vs. Frazier 157 Pac. 2d 125

Skidmore vs. Casale, 160 Fed. 2d, 527

Goldberg vs. Worman, 37 Fed. Supp. 778

The word "commerce" in itself implies a continuity or regularity in the flow of goods. There are many instances where the courts have refused to subject an employer to liability where the interstate aspects of his

business are relatively insignificant and inconsequential. The cases arising under the so-called "de minimis" doctrine come under this theory. Although we make no claim that the transaction involved in this case falls strictly under the "de minimis" doctrine, we do feel that the basic reasoning upon which that doctrine rests is applicable.

As is now well settled, the "percentage theory" is not a valid criterion in determining whether the de minimis doctrine will avoid the application of the Act. Under the recent decisions, any percentage of an employer's business, however small, will result in a refusal to apply the de minimis doctrine, **if there is a regular constant and consistent flow of goods in interstate commerce.** For example, the United States Supreme Court refused to apply the de minimis doctrine to **regular** shipments in interstate commerce of one-half of one per cent of the total volume of goods produced, in Mabee vs. White Plains Pub. Co., 327 U. S. 178.

But where the interstate transactions are sporadic, occasional, or isolated in character, the courts have often refused to apply the Act, although a much larger percentage was involved.

Hooks vs. Nashville Breeko Block & Title Co., 39 Fed. Supp., 369

Reynolds vs. Carter, 9 So. 2d, 322

Wiley vs. Stewart Sand & Mat. Co., 206 SW 2d, 362

Schwellenbach vs. Grant, 79 Fed. Supp. 975

Goldberg vs. Worman, 37 Fed. Supp. 778

Hill vs. Jones, 59 Fed. Supp. 569

Contrary to appellant's contention, as set forth on page 9 of his brief, the trial court did not ignore the rule that coverage is to be determined by the character of the employee's activities, rather that the nature of the employer's business. Nor did the court determine that the employees were not engaged in interstate commerce merely because the "usual and ordinary" course of the employer's business was confined to intrastate commerce. It did determine that the Rogers Brothers Seed Company transaction was a **single, isolated** transaction. As such it was not in the usual and ordinary course of appellee's business. The trial court then concluded that because it was a single, isolated transaction not in the usual course of appellee's business, it did not constitute interstate commerce within the meaning of the Act. It is the only transaction of that nature which appellee ever undertook, and no claim is or can be made that appellee was otherwise engaged in interstate commerce or the production of goods for interstate commerce.The trial court simply concluded that Congress never intended the Act to subject an employer to liability whose operations were wholly confined to intrastate commerce except for some isolated unusual event. The key to the trial court's thinking is, of course, the absence of any regularity or recurrence, inherent in the very meaning of the word "commerce".

Moreover, the trial court undoubtedly took into consideration the fact that the bean boxes and pallets were not in the ordinary sense of the term "produced for commerce." In the ordinary and usual sense of that term, we think of commerce and production for com-

merce as meaning that goods are being regularly produced for sale to various wholesale or retail dealers, who, in turn, will resell them to ultimate consumers. The goods themselves continually flow into and become part of the "stream of commerce." Here we have one transaction between the producer and the ultimate consumer. We have a small manufacturer, producing wholly for local, intrastate consumption, filling a single order for some special equipment to be kept and used in the customer's plant. The customer, too, in one sense, was a local customer. Surely, Congress never intended the Act to apply to such cases, which are not commerce in any reasonable sense.

The characteristic of recurrence with some degree of regularity as an essential characteristic of "commerce" within the meaning of various Federal statutes has been inferentially, if not directly, recognized by the United States Supreme Court. As the court said, in Swift & Co. vs. United States, 196 U. S. 375:

> "When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, **and when this is a typical, constantly recurring** course, the current thus existing is a current of commerce among the states, and the purchaser of the cattle is a part and incident of such commerce". (Emphasis added).

And in NLRB vs. Fainblatt, 306 U. S. 601:

> "Examining the Act (National Labor Relations

> Act) in the light of its purpose and of the circumstances in which it must be applied, we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim **de minimis.**"

While we have never contended that the transaction here involved comes strictly under the de minimis doctrine, it is analogous thereto. We think the decision of the trial court soundly rests on the somewhat broader concept that the single, isolated, unusual transaction involved in this case did not substantially change the character of appellee's activities from the intrastate field. It was, of course, the right and privilege of appellee to restrict its activities to that field, even for the express purpose of avoiding the application of the Fair Labor Standards Act. We do not believe Congress ever intended that a small business concern which in good faith earnestly seeks to so limit its activities, becomes subject to this Act because a part of the production of a relatively small order, for a local customer, is used by that customer outside the state. Particularly is this true where the items involved are not really articles which will ever enter the "stream of commerce", and will never reach the usual marts of trade.

Respectfully submitted,

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